(3)

Supreme Court, U.S.
FILED
MAR 25 2003
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2002
No. 02-473

UNITED STATES OF AMERICA
Petitioner,

vs.

LASHAWN LOWELL BANKS
Respondent.

ON WRIT OF CERTIORARI
TO THE NINTH CIRCUIT COURT OF APPEALS

BRIEF OF WAYNE COUNTY, MICHIGAN AS AMICUS CURIAE IN SUPPORT OF PETITIONER

MICHAEL E. DUGGAN
Wayne County Prosecuting Attorney

TIMOTHY A. BAUGHMAN
Chief of Research, Training and Appeals
11th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313)224-5792

---

34 pp

STATEMENT OF THE QUESTION

I.

May law-enforcement officers executing a search warrant for narcotics conclude, consistent with both statute and the Fourth Amendment, that they have been denied entry after waiting for 15-20 seconds after knocking and announcing, and if not, does the Fourth Amendment require the exclusion of evidence obtained under a valid search warrant, and during a search of proper scope, because of a violation of principles of announcement?

Table of Contents

Page

Statement of the Question ..... -i-

Index of Authorities ..... -ii-

Interest of Amicus ..... -1-

Statement of Facts ..... -1-

Argument ..... -2-

Conclusion ..... -27-

FEDERAL CASES

Adams v New York, 192 U.S. 585,
24 S. Ct. 372, 48 L. Ed. 575 (1904) 5

Aponte Matos v Toledo Davila,
135 F.3d 182 (CA1, 1998)- 28

Boyd v United States, 116 U.S. 616,
6 S. Ct. 524, 29 L. Ed. 746 (1886) 3, 4, 5

Brewer v Williams, 430 U.S. 387,
51 L. Ed. 2d 424, 97 S. Ct. 1232 (1977) ... 13

Elkins v United States, 364 U.S. 206,
80 S. Ct. 1437, 4 L. Ed. 2d 1669 (1960) 6

Johnson v Louisiana., 406 U.S. 356,
32 L. Ed. 2d 152, 92 S. Ct. 1620 (1972) .. 10

Mapp v Ohio, 367 U.S. 643,
81 S. Ct. 1684, 6 L. Ed. 2d 1081 6

Miller v United States, 357 U.S. 301,
2 L. Ed. 2d 1332,
78 S. Ct. 1190 (1958) 18, 19, 21, 22

Murray v United States, 487 U.S. 533,
101 L. Ed. 2d 472, 108 S. Ct. 2529 (1988) 5, 16

Nardone v United States, 308 U.S. 338,
60 S. Ct. 266, 84 L. Ed. 307 (1939) 8

New York v Harris, 495 U.S. 14,
109 L. Ed. 2d 13, 110 S. Ct. 1640 (1990) . 21

Nix v Williams, 467 U.S. 431,
81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984) 13, 14

Payton v New York, 445 U.S. 544,
63 L. Ed. 2d 639, 100 S. Ct. 1371 (1980) . 21

Pennsylvania Board of Parole v Scott,
524 U.S. 357, 118 S. Ct. 2014,
141 L. Ed. 2d 344 (1998) 6, 17

Sabbath v United States, 391 U.S. 585,
20 L. Ed. 2d 828, 88 S. Ct. 1755 (1968) 21, 22

Search Warrant Dated July 4, 1977,
667 F.2d 117 (CA DC, 1981); 22

Segura v United States, 468 U.S. 796,
82 L. Ed. 2d 599, 104 S. Ct. 3380 (1984) 15, 16

Silverthorne Lumber v United States, 251 U.S. 385,
64 L. Ed. 2d 319, 40 S. Ct. 182 (1920) 16

Stone v Powell, 428 U.S. 465,
96 S. Ct. 3037, 49 L. Ed. 2d 1067 (1976) ... 6

Terry v Ohio, 392 U.S. 1 7

United States v Baker,
638 F.2d 198 (CA10, 1980) 22

United States v Calandra, 414 U.S. 338,
94 S. Ct. 613, 38 L. Ed. 2d 561 (1974) ... 6, 8

United States v Ceccolini, 435 U.S. 268,
55 L. Ed. 2d 268, 98 S. Ct. 1054 (1978) ... 11

United States v Davis,
346 F. Supp. 435 (CD Ill. 1972) 22

United States v Dice,
200 F.3d 978 (CA 6, 2000) 2

United States v Dicesare,
765 F.2d 890 (1985) 22

United States v. Jones,
149 F.3d 715 (7th Cir.1998) 25

United States v Langford,
314 F.3d 892 (CA 7, 2002) 2, 24, 25

United States v Leon, 468 U.S. 1032,
104 S. Ct. 3479, 82 L. Ed. 2d 778 (1984) ... 6

Weeks v United States, 232 U.S. 383,
34 S. Ct. 341, 58 L. Ed. 504 (1914) 5, 6

Williams v Nix,
700 F.2d 1164 (CA 8, 1983) 14, 16, 25

Wilson v Arkansas, 514 U.S. 927,
115 S. Ct. 1914,
131 L. Ed. 2d 976 (1995) 2, 23

Wong Sun v United States,
371 U.S. 471, 83 S. Ct. 407,
9 L. Ed. 2d 441 (1963) 10, 11, 14,
26

STATE CASES

Commonwealth v Dana,
43 Mass. 329 (1841) 4

Mazepink v State,
987 S.W.2d 648 (1999) 2

People v Stevens,
460 Mich. 626 (1999) 2

FEDERAL STATUTES

18 U.S.C. §3109 20

OTHER

Entick v Carrington,
19 Howell's State Trials 1029 (1765) 2

Semayne's Case,
77 Eng Rep 194, 195 (1603) 3

United States v La Jeune,
26 F Case 832, 842 (CCD Mass 1822)
(No 15,551) 3

Wilkes v Wood,
19 Howell's State Trials 1153 (1763) 2
1 Greenleaf, A Treatise on the Law of Evidence
(14th ed, 1884) 3

4 Wigmore, Evidence (2d Ed: 1923) 5

Amsterdam, "Search and Seizure and Section 2255:
A Comment," 420 Pa L Rev 378, 388-389
(1964) 7, 8

Hickok, editor, The Bill of Rights (University Press of
Virginia, 1991) 4

Interest of the Amicus

Amicus is the County of Wayne, Michigan. Wayne County is the largest County in the State of Michigan, and the criminal division of Wayne County Circuit Court is among the largest and busiest in the entire United States. The Wayne County Prosecuting Attorney, charged by state statutes and the State Constitution with responsibility for litigating all criminal prosecutions within his jurisdiction, has a vital interest in the outcome of the current litigation, as it may well affect the execution of his constitutional and statutory duties.

As the legal representative of a unit of state government, Supreme Court Rule 37 permits *Amicus* to file a supporting brief without permission of the parties.

Statement of Material Facts and Proceedings

Amicus concurs with the statement by the Government as Petitioner.

Argument

A. Introduction

The United States argues in this case that principles of knock and announce as embodied both in statute and the Fourth Amendment were not violated in this case. Amicus joins fully in that argument. But even if the 9th Circuit correctly resolved that question, there remains the question of whether an exclusionary sanction should be applied to the violation, a question reserved by this Court in *Wilson* v *Arkansas*, 514 US 927, 936, 115 S Ct 1914, 131 L Ed 2d 976 (1995). Further, federal circuits are split on the question, the 6th Circuit holding that an exclusionary sanction must be applied, see *United States v Dice*, 200 F3d 978 (CA 6, 2000), and the 7th Circuit holding that application of an exclusionary sanction is inappropriate, see *United States v Langford*, 314 F3d 892 (CA 7, 2002). State supreme courts are also in disagreement, the Michigan Supreme Court holding that exclusion is inappropriate, *People v Stevens*, 460 Mich 626 (1999), and the Arkansas Supreme Court reaching the contrary conclusion, *Mazepink v State*, 987 SW2d 648 (1999). Should this Court conclude that the entry here was improper, the admissibility of the evidence cannot be resolved without addressing this question. If necessary, amicus suggests that direction for briefing on the question would not be inappropriate.

B. The Exclusionary Rule: Its Purpose and Limits

(1) Purpose

The purpose of the exclusionary rule is to deter improper police conduct by denying the Government the *fruit* of that conduct; this principle is well-established, and Amicus thus will not labor long to demonstrate it. While the Fourth Amendment itself has roots in such cases as *Wilkes* v *Wood*, 19 Howell's State Trials 1153 (1763), *Entick* v *Carrington*, 19 Howell's State Trials 1029 (1765) (upholding a verdict for

trespass against the officers executing a general warrant), and *Semayne's Case*, 77 Eng Rep 194, 195 (1603) (specifically concerning forcible entries into dwellings, and stating that "in all cases when the King is party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K(ing)'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors...."), none of these cases resulted in the exclusion of evidence from a criminal proceeding, being rather, for the most part, civil cases to recover damages. Not until almost 100 years after the adoption of the Fourth Amendment did the notion of exclusion of evidence for its violation appear in our jurisprudence, in the case of *Boyd* v *United States*, 116 US 616, 6 S Ct 524, 29 L Ed 746 (1886). Indeed, the contrary of the proposition that evidence should be excluded from trial based on the manner of its acquisition was well-established by the time of the *Boyd* decision. In 1 Greenleaf, *A Treatise on the Law of Evidence* (14th ed, 1884), § 254a, p.325-326 the author listed among those doctrines of evidence which were "common to all the United States" that:

> ...though papers and other subjects of evidence may have been illegally taken from the possession of the party against whom they are offered, or otherwise unlawfully obtained, this is no valid objection to their admissibility if they are pertinent to the issue. The court will not take notice how they were obtained, whether lawfully or unlawfully, nor will it form an issue to determine the question.

See also *United States* v *La Jeune*, 26 F Case 832, 842 (CCD Mass 1822) (No 15,551), where Justice Story, sitting as circuit justice, rejected an argument that evidence should not be admitted because unlawfully seized, remarking that "...the law deliberates not on the mode, by which (evidence) has come to the possession of the party, but on its value in

establishing itself as satisfactory proof." This opinion, along with that of Justice Wilde of the Supreme Judicial Court of Massachusetts in *Commonwealth* v *Dana*, 43 Mass 329, 337 (1841) that

> (i)f the search warrant were illegal, or if the officer serving the warrant exceeded his authority, the party on whose complaint the warrant issued, or the officer, would be responsible for the wrong done; but this is no good reason for excluding the papers as evidence, if they were pertinent to the issue....the court can take no notice how they were obtained, whether lawfully or unlawfully; nor would they form a collateral issue to determine that question,

were "invoked as authority for like decisions in other state courts" and "relied on by federal courts to justify the admission of books and papers into evidence, regardless of the legality of their seizure." Bradford P. Wilson, "The Fourth Amendment as More Than a Form of Words: The View from the Founding," in Hickok, editor, *The Bill of Rights* (University Press of Virginia, 1991), p.151, 169. Case reports from almost the first 100 years of the existence of the Fourth Amendment reveal a number of actions alleging a wrongful search or seizure, with "traditional common-law forms of action associated with trespass...without exception, the modes of redress invoked." Wilson, at 165. The Fourth Amendment was not ignored; rather, "the requirements of due process and of nonarbitrary searches and seizures lived in harmony in the thought of the Founders. In that same jurisprudence, however, the exclusionary rule has no life at all." Wilson, at 169. And then came *Boyd* (regarding which Wigmore remarked that the doctrine that evidence could not be excluded because of the manner of its acquisition "was never doubted until the appearance of the ill-starred majority

opinion of *Boyd v United States*...." 4 Wigmore, *Evidence* (2d Ed: 1923) § 2184, p.632).

Boyd is of historical interest as the progenitor of the exclusionary rule, but its rationale has been discredited, and it thus does not illuminate the purpose of the exclusionary rule as currently understood. The majority in *Boyd* relied heavily on the *Fifth* Amendment to invalidate an order that Boyd produce an invoice to show the quantity and value of goods alleged to have been illegally imported at a hearing on the forfeiture of those goods, a rationale not followed today. Indeed, 18 years later the Supreme Court in *Adams* v *New York*, 192 US 585, 24 S Ct 372, 48 L Ed 575 (1904) rejected a challenge to evidence seized pursuant to a search warrant by simply declaring that courts will not inquire into the means by which evidence otherwise admissible was acquired, distinguishing *Boyd* on its Fifth Amendment rationale by limiting it to situations where a "positive act" of production on the part of the defendant was required.

It was *Weeks* v *United States*, 232 US 383, 34 S Ct 341, 58 L Ed 504 (1914) which first held that evidence may be excluded on the ground of the method of its seizure, established in the context not of a motion to suppress in the criminal case, but a motion for return of property before trial on the ground that the government had no right to possess it, with the same resulted reached–the loss of the ability of the government to offer the items as evidence at the criminal trial. Here the rationale for exclusion had no Fifth Amendment basis; rather, said the Court, "The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures...should find no sanction in the judgment of the courts....To sanction(an unlawful invasion of the dwelling) would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution...." In short, the evidence was excluded to prevent the Government from obtaining an *advantage* through a violation of the Constitution.

Of course, it was *Mapp* v *Ohio*, 367 US 643, 81 S Ct 1684, 6 L Ed 2d 1081) which applied the rule of *Weeks* to the States by finding the Fourth Amendment "incorporated" by the Fourteenth Amendment, and the exclusion of evidence gained from its violation necessary as a "deterrent safeguard without insistence upon which the Fourth Amendment would" be reduced to a "form of words," the Court also quoting approvingly from *Elkins* v *United States*, 364 US 206, 80 S Ct 1437, 4 L Ed 2d 1669 (1960) that "The rule is calculated to prevent not to repair. Its purpose is to deter...by removing the incentive to disregard it."

It is now clear beyond dispute that the exclusionary rule is *not* "part and parcel" with the Fourth Amendment, rather the rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v *Calandra*, 414 US 338, 94 S Ct 613, 38 L Ed 2d 561 (1974). See also *Stone* v *Powell*, 428 US 465, 96 S Ct 3037, 49 L Ed 2d 1067 (1976); *United States* v *Leon*, 468 US 1032, 104 S Ct 3479, 82 L Ed 2d 778 (1984). Most recently the Court in *Pennsylvania Board of Parole* v *Scott*, 524 US 357, 118 S Ct 2014,141 L Ed 2d 344 (1998) held that the exclusionary rule is not to be applied at parole violation hearings, the Court observing in its analysis that the admission of illegally seized evidence does not violate the Constitution; the Fourth Amendment is violated when the illegal search occurs. The exclusionary rule is instead a judicially created means of deterring illegal searches and seizures, which has societal costs, meaning that it is not to be applied unthinkingly. Indeed, Chief Justice Warren remarked in *Terry* v *Ohio*, 392 US 1, 13-15; 88 S Ct 1868; 20 L Ed 2d 889 (1968) that:

> The exclusionary rule has its limitations as a tool of judicial control....[In] some contexts the rule is ineffective as a deterrent....Proper adjudication of cases in which the

> exclusionary rule is invoked demands a constant awareness of these limitations....[A] rigid and unthinking application of the...rule...may exact a high toll in human injury and frustration of efforts to prevent crime.

The purpose of the rule, then, is not to repair, but to deter. It carries with it a high societal cost in damaging the trial as a search for truth by excluding reliable and probative evidence, and is thus not to be applied "unthinkingly." As one commentator has well put it, "Granted that so many criminals must go free to deter the constable from blundering, pursuance of this police of liberation beyond the confines of necessity inflicts gratuitous harm on the public interest." Amsterdam, "Search and Seizure and Section 2255: A Comment," 420 Pa L Rev 378, 388-389 (1964). What is a "thinking" application of the rule which at least attempts in some measure to avoid the infliction of gratuitous harm on the public? What are its current limits?

(2) <u>Limitations on the Exclusionary Rule</u>

That "but for" causation is a *necessary* ***but not sufficient*** element of a claim that evidence should be excluded as a result of a constitutional violation by the police is readily apparent from exclusionary rule jurisprudence. As Professor LaFave has said, "in the simplest of Fourth Amendment exclusionary rule cases, the challenged evidence is quite clearly 'direct' or 'primary' in its relationship to the prior arrest or search, so that if it is determined that a Fourth Amendment violation has occurred it is apparent that the consequence must be suppression of that evidence in the trial of a defendant who has standing to object to the violation." 5 LaFave, *Search and Seizure* (3rd Ed.), §11.4, p. 231-232. But the exclusionary rule is not applicable in *all* cases where the evidence at issue would not have been discovered "but for" the improper conduct of the police, despite its deterrent

effect in these situations. In some situations, *despite* "but for" causation the rule is not applied because its cost is too high when weighed against its benefits.

(a) Standing

The initial restriction on the application of the exclusionary rule in situations where police error or misconduct is the "but for" cause of the discovery of the evidence to be offered at trial is that of "standing." The Fourth Amendment protection is personal, and though excluding evidence where the Fourth Amendment rights of the individual against whom the evidence is offered were not offended might nonetheless carry with it some deterrent effect, it has long been recognized that the "need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Calandra*, supra. The accused simply will not be heard to complain unless it is his or her Fourth Amendment rights that were compromised by the police.

(b) Fruit of the Poisonous Tree and Purged Taint

Though *Nardone* v *United States*, 308 US 338, 60 S Ct 266, 84 L Ed 307 (1939) is the first case to speak of the causal connection between improper governmental conduct and the evidence allegedly its fruit being so "attenuated" as to "dissipate the taint" of the wrongdoing and allow admission of the evidence, the doctrine came to full flower in *Wong Sun* v *United States*, 371 US 471, 83 S Ct 407, 9 L Ed 2d 441 (1963). Essentially, an informant who was a "first time" informant with no record of reliability, told federal agents that he had purchased heroin the night before from an individual known to him only as "Blackie Toy," who was the proprietor of a laundry on a particular thirty block street. The agents went to the laundry without an arrest or search warrant, and when Toy answered the door an agent said he had come for

his laundry. When Toy began to close the door, the agent identified himself, and Toy slammed the door and ran. The agents broke open the door and arrested Toy in his bedroom, and he gave information leading to another person, who gave up tubes of heroin. Toy also led the agents to the living quarters of Wong Sun, who was arrested and ultimately made incriminating statements. Before the Supreme Court were the admissibility of Toy's admissions in his bedroom, the admissibility of the heroin turned over by the third party who was discovered through Toy's admissions, the admissibility of Wong Sun's confession which was made several days after his arrest and release on recognizance; and the admissibility of the heroin turned over by the third party against Wong Sun.

The majority found that the agents lacked probable cause for the arrest of Toy, arising either from the information given them by the informant, or in combination with Toy's response to their presence at the laundry. Because the arrest without probable cause was unlawful, so was the entry to achieve it. The statements of Toy were excludable as the fruit of the illegal arrest, held the Court, as under the circumstances they were not the result of an intervening act of free will. The statements led the agents to a third party, Yee, who turned over heroin, and it was clear that the heroin would not have been obtained from Yee absent Toy's statements. The Court stated that the test for exclusion is *not* whether but for the illegal conduct it would not have come to light, but whether, "granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality...." *Wong Sun*, at 455. The heroin turned over by Yee met that test, and was thus inadmissible. Wong Sun's arrest was also held to be without probable cause by the lower court, but the Court found no reason to address that question, because "no evidentiary consequences" turned upon it. Wong Sun's confession was not the fruit of his arrest, in that he gave it voluntarily several days after he had been arraigned and released on his own recognizance. The Court thus found that the "connection

between the arrest and the statement had 'become so attenuated as to dissipate the taint,'" though clearly in a "but for" sense it was the fruit of the illegal arrest. Plainly, then, the Court rejected the "but for" test. Though the heroin surrendered by Yee was inadmissible against Toy because the result of Toy's improperly gained statements, this result did not obtain with respect to Wong Sun, as he had no standing to claim it.

Wong Sun teaches that evidence which is discovered as the result of improper police conduct is not necessarily excludable, for the exclusionary rule is not to be applied on a strict "but for" or "cause and effect" basis. The "fruit of the poisonous tree" must be excluded–there must be a "but for" causation demonstrated--but it is not true that all evidence is "fruit of the poisonous tree" simply because it would not have come to light but for the illegal actions of the police, the question instead being in each case whether the evidence gained was "come at by *exploitation of the primary illegality*." Where the causal connection is attenuated, or the "taint" somehow "purged," exclusion will not result.

Two other cases well make this point. *Johnson* v *Louisiana*. 406 US 356, 32 L Ed 2d 152, 92 S Ct 1620 (1972) is a similar case on this point. The defendant claimed that his arrest in the nighttime without warrant was invalid absent some showing of exigent circumstances. The Supreme Court, however, declined to discuss whether the arrest was illegal, because even assuming that it was no exclusionary remedy would result. The defendant sought to have his lineup identification excluded as a fruit of the arrest. But the Court found that the lineup identification was not a fruit of the arrest under *Wong Sun*. Certainly "but for" the arrest the lineup would not have occurred; however, prior to the lineup (at which the defendant was represented by counsel) he was *arraigned*, and bail set. At the time of the lineup, then, his custody was not pursuant to the arrest, but to the commitment of the arraigning magistrate. Under these circumstances, held

the Court, it could not be said that the lineup was the result of "exploitation" of the challenged arrest, but rather resulted from "means sufficiently distinguishable to be purged of the primary taint."

Though "but for" causation existed, exclusion as a sanction was also held not required in *United States* v *Ceccolini*, 435 US 268, 55 L Ed 2d 268, 98 S Ct 1054 (1978). A police officer was taking a break in the defendant's flower shop, and while engaging in idle conversation with a shop employee noticed an envelope with money protruding from it lying on the cash register. The officer looked into the envelope and discovered that it contained not only money but also betting slips. The officer replaced the envelope and asked the employee, who had not seen these actions, to whom the envelope belonged. She told him it belonged to the defendant, resulting in his subpoena before a grand jury, where he committed perjury. The flower shop employee testified at the trial, and the question was whether the testimony of the employee was the poison fruit of the search of the envelope by the officer.

Certainly, "but for" the officer's improper conduct he would never have asked his question of the employee, and she would never have become a witness. The Court reiterated that "the question of causal connection in this setting, as in so many other questions with which the law concerns itself, is not be determined solely through the sort of analysis which would be applicable in the physical sciences. The issue cannot be decided on the basis of causation in the logical sense alone...." *Ceccolini*, at 276. The Court found that the evidence was overwhelming that the witness testified of her own free will, in no way coerced or induced by official authority as a result of the discovery of the betting slips.

(c) <u>Inevitable Discovery</u>

Nix v *Williams*, 467 US 431, 81 L Ed 2d 377, 104 S Ct 2501 (1984) is a further example of circumstances where though evidence may be discovered as a result of improper police conduct, it will nonetheless not be excluded in order to deter that conduct. The case delineates the nature and scope of the doctrine of "inevitable discovery."

A ten year old girl disappeared from a YMCA building where she had gone with her parents to watch an athletic contest. A warrant was issued for the defendant's arrest, and a large-scale search for the girl undertaken. There was evidence that she had been left somewhere between Des Moines, the place from which she was taken, and a highway rest stop where some of her clothing was found, and it was this area which was being searched by a small army of police and volunteers. In the meantime the defendant surrendered, and ultimately led the police to the body. His confession was found to have been improperly taken in the opinion from the United States Supreme Court commonly known as the "good Christian burial speech" case of *Brewer* v *Williams*, 430 US 387, 51 L Ed 2d 424, 97 S Ct 1232 (1977). The Court left open whether the body of the girl itself was the fruit of the improperly gained confession, so that the discovery of the body and any evidence gained from its discovery would be inadmissible, the Court expressly noting that this evidence "might well be admissible on the theory that the body would have been discovered in any event...."

On the retrial of Williams evidence from the discovery of the girl's body was admitted, though defendant's confession, and the fact that he had led the police to the body, were not. The state trial judge concluded that the state had proven by a preponderance of the evidence that the search team would have discovered the body within a short time even if Williams had not led the police it. However, on habeas corpus the Eighth Circuit held that inevitable

discovery did not apply because it was necessary to demonstrate not only that the evidence would inevitably have been discovered, but also that the constitutional error itself was committed in good faith. *Williams* v *Nix*, 700 F2d 1164 (CA 8, 1983). The Supreme Court disagreed with this formulation of the test.

The Court agreed that there is an exception to the exclusionary rule for evidence which would inevitably have been discovered; while, consistent with the deterrent purpose of the exclusionary rule, the police may not place themselves in a *better* position through impermissible conduct, there is no reason, held the Court, to put the police and prosecution in a *worse* position than they would have been *had the constitutional violation never occurred*. The good faith or bad faith of the police in the conduct found to be improper is thus irrelevant, for the deterrence rationale is served by placing the police in the *same position they would have been in if no error or misconduct had occurred at all*. *Nix*, at 387. Where the evidence would inevitably have been discovered the evidence is simply considered not the fruit of the illegality--there is no *exploitation* of the illegality, in *Wong Sun* terms--and hence the illegality cannot cause its exclusion. The Court found that the burden of proof on the prosecution to show that the evidence would inevitably have been discovered is the standard of preponderance of the evidence.

(d) <u>Independent Source</u>

Closely related to the fruit of the poisonous tree doctrine is the *independent source* doctrine-- where there is improper police conduct, which leads to the discovery of evidence in a "but for" sense, but the same evidence is come at by an *independent* lawful method, there is no reason to exclude it. This is distinguishable from inevitable discovery in that inevitable discovery does not posit an *actual* independent recovery of the evidence, but a *hypothetical* one, which the prosecution must demonstrate *would* have occurred

absent the illegality. With the independent source doctrine the evidence is actually obtained by a method independent of the improper one.

Illustrative of the doctrine is *Segura* v *United States*, 468 US 796, 82 L Ed 2d 599, 104 S Ct 3380 (1984). The defendant was arrested on probable cause in the lobby of his apartment building, and taken to his apartment unit by the police. When his codefendant opened the door the police entered without permission, and during a limited security check of the apartment observed drug paraphernalia. Two agents remained in the apartment while a search warrant was obtained, which for some reason took almost 19 hours. The warrant was executed and three pounds of cocaine, as well as other evidence, was found. The warrant affidavit showed probable cause, and it was based entirely on evidence independent of the observations made during the improper entry into the apartment. In other words, had that entry *never occurred*, the warrant would still have been issued and the search would have taken place, as the warrant affidavit did not rely in any way on the observations in the apartment. The United States Supreme Court held that the properly executed search pursuant to a warrant which was not gained through information obtained in the unlawful entry was an independent source for the discovery of the evidence found in the apartment.

Murray v *United States*, 487 US 533, 101 L Ed 2d 472, 108 S Ct 2529 (1988) is a "followup" case to *Segura*. There federal agents believed that narcotics were being stored in a warehouse, and made an illegal entry into the warehouse, discovering wrapped bales which they suspected contained marijuana. The premises were kept under surveillance while a warrant was obtained based upon probable cause wholly independent of the improper entry into the warehouse. The warrant was executed and the bales seized.

The Supreme Court found the case governed by *Segura* and the purposes of the exclusionary rule. The defendant attempted to limit the independent source doctrine by arguing that it applies only to evidence which had not been discovered at all during an improper search, but as to that which had been discovered, suppression was required even if the evidence was later discovered validly through a wholly independent method. The Court found the defendant's description of the independent source doctrine inconsistent with prior cases, and unsound as a matter of policy. Prior cases, including *Segura*, had applied the independent source doctrine to all evidence discovered pursuant to an independent source, whether previously also discovered improperly or not. Indeed, Justice Holmes had applied the doctrine to an untainted search which acquired evidence *"identical to the evidence unlawfully acquired."* See *Silverthorne Lumber* v *United States*, 251 US 385, 64 L Ed 2d 319, 40 S Ct 182 (1920). The basis of the independent source doctrine, much like that of the inevitable discovery doctrine, is that "The interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police *in the same*, not a *worse*, position than they would have been in if no police error or misconduct had occurred." *Murray*, quoting from *Nix v Williams* (initial emphasis added; second emphasis in the original).

(e) Noncriminal Proceedings

Finally, certain proceedings which are not criminal are not subject to the exclusionary rule. As already mentioned, the United States Supreme Court has only this past term held that the exclusionary rule does not apply to parole revocation proceedings. The exclusionary rule is a judicially created means of deterring illegal searches and seizures which exacts a high cost upon truth-seeking and law enforcement objectives. Particularly because parole is a variation of imprisonment, in itself a restraint on liberty, the State has an

overwhelming interest in compliance with terms of parole which is hampered by application of the exclusionary rule. Moreover, parole proceedings are administrative and informal, a process which would be altered by application of the exclusionary rule, requiring what in some cases might be extensive litigation on a collateral matter. The deterrence benefits of the rule simply, said the Court, do not outweigh its costs in this context. *Pennsylvania Board of Parole* v *Scott*, supra. Thus, though the evidence may be a "but for" result of improper police conduct, it will not be excluded in such a proceeding.

(3) Conclusion

The purpose of the exclusionary rule is to deter unlawful police conduct by preventing the Government from obtaining any *advantage* from that conduct. This end is accomplished by depriving the Government of the *fruits* improper conduct. Where evidence is discovered which is a "direct" or "primary" result from improper police conduct–a direct effect from a cause–then the evidence will be excluded. The rule of exclusion is not absolute, however, for even where the evidence sought to be admitted is the result of the improper conduct in that but for that conduct it would not have been discovered, the evidence will nonetheless be admissible if 1)the defendant is without standing to complain because it was not his or her right which was violated by the improper police conduct; or 2)if the causal connection between the improper conduct and the discovery of the evidence is so attenuated that it can be said that the "taint" of the improper conduct is dissipated, or, put another way, it can be said that the evidence was not obtained by police "exploitation" of the "primary illegality;" or 3)the Government can demonstrate by a preponderance of the evidence that had the improper conduct which uncovered the evidence not occurred that evidence would have been discovered by lawful means; or 4)the same evidence which was uncovered by the improper conduct is also obtained

through a proper independent source; or 5)the proceeding is not one to which the exclusionary rule is to be applied.

In fine, "but for" causation is a necessary but not sufficient element of a claim that evidence should be excluded as a result of a constitutional violation by the Government; the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police ***in the same, not a worse****, position than they would have been in if no police error or misconduct had occurred.*

C. Knock and Announce and Exclusion of Evidence: The Law Before Wilson v Arkansas

The exclusion of evidence as a sanction for violation of knock and announce principles where the search has otherwise been proper in all respects–the warrant demonstrates probable cause, and the search is one of proper scope and intensity–has slipped into the law almost by stealth. Its origins show no principled analysis of its application to a situation where causality is *entirely* absent; that is, where that which has been seized and is to be offered into evidence cannot be said in *any* principled sense to be the "fruit" of the improper governmental conduct, where in no other circumstance is the drastic sanction of exclusion ordered without a demonstration that *at least* there is a "but/for" causal relationship between the improper conduct and the discovery of the evidence. *Miller* v *United States*, 357 US 301, 2 L Ed 2d 1332, 78 S Ct 1190 (1958) is the oft-cited progenitor of the doctrine of exclusion in this situation, and it is thus with *Miller* that analysis should begin.

One Clifford Reed was arrested on a Washington, D.C. street pursuant to an arrest warrant, and told a federal narcotics agent that he had purchased heroin from Miller through an intermediary named Shepherd. Reed was to make another purchase from Shepherd that morning. An

undercover officer accompanied Reed, and Shepherd agreed to obtain heroin and deliver it to the agent. Shepherd went by cab to Miller's apartment, to which he was followed by authorities. Ultimately the agents went to Miller's apartment and knocked on the door. When Miller asked who was there they responded it was the police. Miller opened the door only partially, with an attached door chain barring the door, and the police then forced their way inside when he began to close the door, ripping the chain off. Their purpose was to arrest Miller, and they had no warrant to arrest, and had not expressly demanded admission or stated the reason for their presence. Marked money that had been given to Reed to purchase the heroin was found in a search of the apartment; none of it was found on Miller's person. The principal issue before the Supreme Court was Miller's arrest was unlawful not because of a lack of probable cause, but because of the manner of entry to achieve the arrest.

Justice Brennan writing for the court observed that the common law had historically limited the authority of law enforcement officers to break the door of a house to effect an arrest, except that authority existed allowing forcible entry to effectuate a *felony* arrest. What was unclear at the common law was whether a forcible entry to arrest for a felony required the existence of an arrest warrant. But in any circumstance, said the Court, the forcible entry was unlawful unless the officer first stated his authority and purpose for demanding admission, unless some exception existed under the circumstances. See 2 L Ed 2d at 1337-1338. In the case before it, the Court found that this requirement had not been met, rendering the arrest "unlawful" and the evidence, which again was not found on the person of Miller, inadmissible. It must be noted that the Court was not purporting to discover and announce a constitutional principle; rather, its ruling was premised on the law of the District of Columbia, which was conceded by all parties to be identical to 18 USC §3109, which concerns on its face, however, only the execution of search warrants.

A decade later the Court considered a similar question in *Sabbath* v *United States*, 391 US 585, 20 L Ed 2d 828, 88 S Ct 1755 (1968). Again the case involved a drug transaction, where one William Jones was caught by customs agents in possession of cocaine, which he said he was to transport to a person named "Johnny" in Los Angeles. A number in his possession was called, and Jones addressed the man answering as "Johnny" and said he had "his thing" and would bring it to his apartment. Equipped with a listening device, Jones made the delivery. Before he left the apartment, the agents went to the apartment door, knocked, and, receiving no response, opened the unlocked door and proceeded inside. Sabbath was arrested and the cocaine found under a couch cushion, from which Sabbath was seen withdrawing his hand as the agents entered. Though 18 USC §3109 only concerns entries to execute search warrants, the Court again stated that entries to arrest "must be tested by criteria identical to those embodied in" the statute, so that "we must look to § 3109 as controlling." 20 L Ed 2d at 833. The Court rejected the argument that opening an unlocked door does not constitute a violation of the statute, holding essentially that the statute prohibits "unannounced intrusions" into a dwelling for the purpose of arrest or search. The drugs found were thus suppressed, the Court this time not stating that the arrest of Sabbath was improper, but that the "agents' entry" was not "consonant with federal law." 20 L Ed 2d at 832.

Since *Miller* and *Sabbath* the Court has clarified several matters. First, absent exigent circumstances, an arrest warrant and reason to believe the person sought is in the dwelling are necessary before a forcible entry may be made into the dwelling of that individual to arrest him or her, see *Payton* v *New York*, 445 US 544, 63 L Ed 2d 639, 100 S Ct 1371 (1980); under *Miller* and *Sabbath*, again unless excused by exigent circumstances, knock and announce principles would also apply. But the question then arose, assuming a violation of *Payton*–an entry to arrest without warrant and

without exigent circumstances justifying its absence–what are the *fruits* of this entry? This question was reached in *New York* v *Harris*, 495 US 14, 109 L Ed 2d 13, 110 S Ct 1640 (1990). There the police made an improper entry because made absent an arrest warrant, and defendant later confessed. But the Court focused on the *nature* of the impropriety–*Payton* was concerned not with warrantless arrests, but warrantless *entries*. Where probable cause exists the seizure of the person is proper; it is the invasion of the privacy of the dwelling which is improper. *Miller* thus spoke overbroadly in referring to the probable cause based arrest after an improper entry as illegal, as the seizure of the person is proper, and only the entry improper. A confession from the defendant, given his valid arrest on probable cause, is thus *not the fruit of the illegality*–the improper entry–but of his valid arrest, and the confession may not be suppressed because of the warrantless entry. The violation of privacy of the dwelling is remedied by suppressing physical evidence found on the premises, if any be found, as it is *this* evidence which is the "fruit" of the improper entry. With regard to the confession it was not "fruit of the poisonous tree" in *Harris* because not "come by by exploitation of the primary illegality."

Subsequent to *Miller* and *Sabbath*, federal circuit courts excluded evidence for violation of 18 USC § 3109 on the *assumption* that exclusion was required by those cases. See e.g. *Search Warrant Dated July 4, 1977*, 667 F2d 117 (CA DC, 1981) ("A failure to comply with section 3109 would lead to the return or suppression of the item wrongfully seized. *Sabbath v. United States, ...; Miller v. United States, ...")*; *United States* v *Baker*, 638 F2d 198 (CA10, 1980); *United States* v *Davis*, 346 F Supp 435 (CD Ill, 1972); *United States* v *Dicesare*, 765 F2d 890 (1985) ("If the officers did violate the statute, the evidence sized during the search must be suppressed" (citing *Miller*)). No attention was paid to whether the evidence was "come by by exploitation of the primary illegality;" that is, whether the evidence discovered

pursuant to a search of proper scope and intensity of premises following the issuance of a valid warrant is indeed the fruit of the "primary illegality"–whether there is *any* causal connection between the improper police conduct, and the discovery of the evidence, *even in a but for sense*! Nor was there any discussion of significant differences between *Miller* and *Sabbath*, involving entries without warrant to effectuate an arrest, which would not justify an invasion of privacy, even where proper, as would the execution of a search warrant, and cases involving the execution of a search warrant, where a neutral and detached judicial officer has made a determination of probable cause and *commanded* the police to search *everywhere* in named premises where the items sought by the warrant might reasonably be expected to be found, a command which the occupants of the premises to be searched have no authority to refuse. The application of an exclusionary sanction to violations of 18 USC § 3109 where a proper search warrant has been executed correctly *except* for an error in the *manner* of entry, and not the *fact* of entry, based on *Miller* and *Sabbath* brings to mind the adage, "Everything looks like a nail when the only tool you have is a hammer."

D. Wilson v Arkansas: Where Should The Law Go From Here?

In *Wilson v Arkansas*, supra, one Sharlene Wilson sold drugs to an informant working for the police, who obtained a search warrant for the premises. Police officers executing the warrant found the main door open, and while opening an unlocked screen door and entering the residence, identified themselves as police officers and stated that they had a warrant. Once inside, the officers seized marijuana, methamphetamine, valium, narcotics paraphernalia, a gun, and ammunition. The Arkansas Supreme Court rejected the "knock and announce" Fourth Amendment claim raised bu Wilson on the ground that knock and announce principles are not constitutional but either statutory or common law.

depending on the jurisdiction, so that no exclusionary sanction could apply. In a unanimous opinion by Justice Thomas, the Supreme Court found that "The common-law knock-and-announce principle was woven quickly into the fabric of early American law," the Court concluding that "Given the longstanding common-law endorsement of the practice of announcement, we have little doubt that the Framers of the Fourth Amendment thought that the method of an officer's entry into a dwelling was among the factors to be considered in assessing the reasonableness of a search or seizure. Contrary to the decision below, we hold that in some circumstances an officer's unannounced entry into a home might be unreasonable under the Fourth Amendment." The Court limited its holding to "some circumstances" because of the equally well-developed understanding that the rule of announcement has exceptions, put generally, when there is a danger of destruction of the evidence or to the safety of the officers. Because the Arkansas Supreme Court had made no attempt to determine the reasonableness of the entry, given its belief that the question was not one of constitutional dimension, the Court remanded for that Court to make the determination as to whether the entry was reasonable or not.

Importantly, the Court did not reach the question of whether, assuming the entry was unreasonable, an exclusionary sanction was appropriate. Rather, the Court noted in footnote 4 to the opinion: "Respondent and its amici also ask us to affirm the denial of petitioner's suppression motion on an alternative ground: that exclusion is not a constitutionally compelled remedy where the unreasonableness of a search stems from the failure of announcement. Analogizing to the "independent source" doctrine applied in *Segura v. United States*..., and the "inevitable discovery" rule adopted in *Nix v. Williams*,..., respondent and its amici argue that any evidence seized after an unreasonable, unannounced entry is *causally disconnected* from the constitutional violation and that exclusion goes beyond the goal of precluding any benefit to the government

flowing from the constitutional violation. Because this remedial issue was not addressed by the court below and is not within the narrow question on which we granted certiorari, we decline to address these arguments" (emphasis supplied). The question thus remains an open one.

As indicated, both federal circuits and state supreme courts are in disagreement on the question. Amicus submits that the Michigan Supreme Court and the 7th Circuit are correct in their analysis. In the 7th Circuit's decision in *Langford*, Judge Posner, writing for the court, observed that:

> The defendant argues that in any event the police broke down the door of the house without complying with the rule that in the absence of an emergency police executing a search or arrest warrant must knock and announce their purpose and identity and give the occupant a reasonable chance to open the door before they enter forcibly....Whether the police complied with the rule in this case is in dispute, but the dispute need not be resolved because we hold that violation of the rule does not authorize exclusion of evidence seized pursuant to the ensuing search. As we said in *United States v. Jones*, 149 F.3d 715, 716-17 (7th Cir.1998), and now elevate to a holding, "it is hard to understand how the discovery of evidence inside a house could be anything but 'inevitable' once the police arrive with a warrant."...
>
> *****
>
> The fruits of an unlawful search are not excludable if it is clear that the police would have discovered those fruits had they obeyed the law. That is the "inevitable discovery" rule, which the Supreme Court adopted in *Nix*

> *v. Williams*....without it the exclusionary remedy would overdeter; and it is fully applicable here. Armed with a valid search warrant, the police in our case would have discovered the defendant's gun even if they had given him enough time to answer their knock before they broke the front door down....
>
> *Langford*, at 894 -895.

And the Michigan Supreme Court, holding that the sanction of exclusion of inappropriate, put it very similarly.

E. <u>Conclusion</u>

If one asks the *right* question–is evidence discovered as a result of a search of proper scope and intensity pursuant to the command of a valid warrant the effect or fruit of the failure of the police either to knock and announce or to wait long enough before entering, a negative answer follows ineluctably, *unless* a purpose of the knock and announce requirements is to allow those inside an opportunity frustrate the warrant by hiding or destroying evidence or harming the officers who are executing it. The *wrong* question is whether the evidence is the effect or fruit of an "illegal entry" or an "illegal search," as both the entry and the search are legal, it is the *manner* of entry which is improper, and its fruit may be a broken door, and there may be no fruit at all. Exclusion of evidence in this circumstance cannot be squared with *Wong Sun* as there is no exploitation of the primary illegality, the evidence instead being discovered by "exploitation" of the command of the search warrant, not the manner of the entry, and also cannot be squared with either inevitable discovery or independent source principles. The short answer is that but for causation is a necessary but not sufficient requirement for application of the exclusionary rule, as these doctrine demonstrate, and it is *entirely missing here*.

Assume several examples: 1)the police enter a home and search it with no warrant at all, and no exigent circumstances or any other independent justification; 2)the police enter a home and search with a search warrant in areas within the home where the items sought could not possibly be found, finding other seizable items instead, and 3)the police enter a home and search it pursuant to a search warrant, finding the items sought in a search of proper scope and intensity, but after having failed to wait after knocking on the door and announcing their presence and purpose for a time sufficient to allow a person in the room furthest from the door to answer. In the first two situations the invasion of privacy simply *should not have occurred at all*. In the first, the entry into the dwelling *should never have occurred*; in the second, the search of certain places within the dwelling should *never have occurred*. The evidence should never have been discovered, privacy should never have been violated, and exclusion is the result. But in the third situation, with a valid search warrant, and a search of proper scope, but a "timing" error with regard to entry, was the invasion of privacy--the entry into the home and the search--proper? Surely it ***was***--the police had a right under law to make it. Was the seizure of property appropriate? Surely it ***was***--the police had a right under law to seize it. Does employing the ***same*** "sanction" where the police had every right to search and seize, but entered too quickly, as when the police had no right to invade premises and seize property at all make any sense? Surely ***not***--in two privacy has been improperly invaded; in the latter, the knock and announce "failure," it has been *validly* invaded. *Only if knocking and announcing has as a purpose that those inside should be given a fair opportunity either to destroy the evidence sought or to injure the officers executing the warrant does exclusion of the evidence in this situation make sense*. These violations are simply different in *kind*, and, most respectfully, Amicus submit that it is myopic to treat them as though they were no different at all. Exclusion of evidence where there has been a valid invasion of privacy, and a proper discovery and seizure of evidence,

then, is not, Amicus submit, an appropriate sanction for police "error" with regard to announcement of presence and purpose. There is no element of "causality" involved--whether viewed as a part of the doctrine of inevitable discovery, or simply as a recognition that the discovery of the evidence is not the fruit of a failure to knock and announce, given that the invasion of privacy involved is completely justified--and exclusion makes no sense, simply thwarting the enforcement of the law, and giving unwarranted immunity to one in possession of drugs.

Exclusion is not to put the police in a *worse position* than if the improper conduct had not occurred, but to prevent them from being in a *better* position *because* of that conduct. The drugs found here were not the fruit of any knock and announce violation, but Michigan law currently requires suppression nonetheless, without careful consideration of the question. Again, if the search warrant was proper, and the search warrant was properly executed as to a search of proper scope and intensity, then the only way the discovery of contraband or evidence on the premises may be viewed as "poison fruit" is to take the view that the failure to knock and announce deprived those inside the opportunity to destroy or successfully hide the evidence. One would hope that no sane society would take such a view explicitly; the law currently has, however, done so implicitly. This court should repudiate such a principle, particularly given the protection provided by civil damages under 42 USC §1983–which has frequently been employed by those who feel aggrieved by the manner of entry of the police, see e.g. *Aponte Matos v Toledo Davila*, 135 F3d 182 (CA1, 1998)–which serves as an appropriate deterrent to an improper manner of entry.

Conclusion

WHEREFORE, this Court should reverse the holding of the Ninth Circuit Court of Appeals.

MICHAEL E. DUGGAN
Wayne County
Prosecuting Attorney

Timothy A. Baughman
Chief of Research, Training, & Appeals
1113 Frank Murphy Hall of Justice
Detroit, Michigan 48226
Phone: 313-224-5792